IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 74 OF 2005.

1. Mrs. Maria Leticia Candida
Rodrigues e Martins,
resident of Varca, Salcete, Goa.

2. Mr. Mario Antonio Judas Martins,
resident of Varca, Salcete, Goa.

3. Mrs. Maria Linia Glorina
Monica Colaco,
resident of Varca, Salcete, Goa. .... Petitioners.

Versus

Shri Elias Inacio Caetano
D'Costa, son of late Mr. Joao
Simao D'Costa, major in age,
service, resident of House
No.265, Laxette, Varca,
Salcete, Goa. .... Respondent.

Mr. Vivek Rodrigues, Advocate for the Petitioners.

Mr.M.S. Usgaonkar, Senior Advocate with Ms. P. Kamat, Advocate for the Respondent.

CORAM: V. C. DAGA, J.

DATE: 27th JULY, 2006.

ORAL JUDGMENT:

Heard learned counsel for the rival parties. Rule, returnable forthwith. Mr. M. Usgaonkar, Senior Advocate appearing with Ms. P.

Kamat, Advocate for the respondent waives service.

2. Heard finally by consent of parties.

3. This petition is directed against the Order dated 17th January, 2006 passed by the IInd Addl. Civil Judge Senior Division at Margao refusing to grant amendment to the plaint and addition of parties moved by the plaintiffs.

Submissions:

4. The learned counsel appearing for the petitioners submits that the impugned order suffers from failure on the part of the Trial Court to exercise jurisdiction in accordance with law. In his submission reasons given by the trial Court are unsustainable. He submits that so far as the finding recorded by the trial Court in paragraph 10 to the effect that the amendment if allowed would change the entire complexion of the case from sole owners to co-ownership is unsustainable. He submits that looking to the prayers made in the suit, it is clear that all the three plaintiffs have jointly prayed that they are the sole owners in possession of the suit property; meaning thereby the relief of co-ownership is pregnant in the said pleadings. He further submits that so far as the findings recorded in paragraph 11 of the impugned order are concerned, they are also unsustainable in view of the clear provisions of Order 6,

Rule 17 of C.P.C. since the trial of the suit is yet to begin. He further submits that so far as the clarification of the boundaries with respect to the suit property are concerned they can hardly be said to be factors resulting in changing the complexion of the case. He, therefore, submits that the impugned order is sustainable and deserves to be set aside and petition is liable to be allowed.

5. Per contra, Mr. Usgaonkar, learned Senior Counsel appearing for the respondent submits that the amendment is barred by limitation and therefore the trial Court was perfectly justified in refusing to grant amendment. He, while elaborating his arguments, placed reliance on paragraph 19 of the plaint wherein it is mentioned that the cause of action for the suit arose on 11.12.2001. Thus according to him calculating limitation from the said date, amendment would be barred by limitation. However, he concedes that the finding recorded in paragraph 11 of the impugned order of the trial Court is unsustainable. He also found it difficult to support the finding of the Court below recorded in paragraph 10 of the impugned order. He, lastly, submits that if at all petition is to be allowed, all rival contentions of the parties on merits may be kept open.

Consideration:

6. Having heard the rival parties, it is not in dispute that the cause of action shown in paragraph 19 of the plaint is on 11.12.2001. However, prima facie it only relates to alleged fraudulent decree alleged to have been obtained by dead persons. Insofar as the declaration of ownership vis-a-vis existing defendant is concerned the cause of action prima facie cannot be said to be running only on 11.12.2001. Apart from this the proposed amendment relates to the declaration of co-ownership which is already claimed in the suit coupled with clarification of the boundaries. So far as period of limitation to claim such declaration is concerned it is one of the factors to be considered, however that by itself cannot be a ground to non-suit the plaintiffs to seek amendment to the plaint. The question of limitation being mixed question of law and fact, it can always be raised in the suit and the Court can try it on its own merits. The law with regard to amendment is well settled as can be seen from ***Mudra Salt and Chemical Industries vs. Collector, Thane and others*** reported in **2001 (3) Mh.L.J. 151.**

7. So far addition of parties is concerned, persons sought to be impleaded are necessary parties, their presence before the Court would be necessary in order to enable the Court effectually and completely to

adjudicate upon and settle all the questions involved in the suit.

8. Having taken overall view of the matter, the impugned order is not sustainable. The same is liable to be quashed and set aside. The application seeking amendment to the plaint and addition of parties is allowed subject to payment of costs quantified in the sum of Rs.2500/-. The amount of costs to be deposited with the trial Court for being paid to the respondent. Amendment to be carried out in the plaint within 15 days from the date of receipt of the copy of this order by the trial Court. The trial Court shall be free to proceed against added defendants in accordance with law. Needless to mention that all rival contentions on merits are kept open.

9. In the result, petition is allowed. Rule is made absolute in terms of this order with costs as quantified.

V. C. DAGA, J.

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